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Dear Mr. Brown:

As you are aware the file in this case is extensive. It has therefore taken me quite some time to digest it. I wanted to send you an overview and analysis of my understanding of the issues. I am planning to file a motion shortly to lift the stay. I can see no reason why there is a need to wait. There are issues which need to be resolved that are factual issues which the FCC has advised should be determined by the District Court, and not the FCC. These factual issues resolve both the Jan 1995 traffic transfer issue and plaintiffs Jan 1997 Supplemental complaint dealing with the June 10th 1996 penalty infliction.

There are two FCC Orders released October 23, 1995 and January 12, 2007 which Judge Bassler and Wigenton have not seen which I believe establish liability. The FCC October 23, 1995 ORDER explicitly indicates that the two tariff sections AT&T was required to adhere to were the exact tariff sections at issue in plaintiff's case, those being Section 2.1.8 traffic transfers and 2) Pre June 17th 1994 discontinuance w/o liability grandfathering. Here is a link to that Order. See http://www.fcc.gov/Bureaus/Common_Carrier/Orders/1995/fcc95427.txt The relevant section of the FCC Order is here as Exhibit A.

As the FCC 2003 decision states AT&T's sole defense in 1995 was under section 2.2.4 which was "fraudulent use." AT&T claimed it had the ability to deny the CCI-PSE traffic transfer because AT&T simply suspected fraudulent use. There was nothing conclusive evidencing that plaintiffs were actually engaging in a fraudulent transaction to violate the tariff. As such, in 1995, AT&T's argued that when traffic only is transferred without transferring the plan, CCI's CSTPII/RVPP plans must keep and maintain CCI's revenue and time commitments. AT&T's fraudulent use assertion was that if the majority of CCI's end-user traffic was transferred to PSE, absent a plan transfer, CCI would not be able to meet CCI's plans revenue commitment. The FCC 2003 decision states that in 1996, AT&T advised the FCC that termination penalties were not an issue;

because CCI not only must keep its termination obligation, but since CCI did not plan on terminating the non-transferred plans—there was no issue concerning termination penalties.

Based on the October 23, 1995 FCC Order, AT&T agreed to continue grandfathering plaintiff's pre June 17, 1994 penalty immune plans; thus AT&T's fraudulent use assertion made no sense. The October 23, 1995 FCC Order states that even after AT&T was re-classified as a non-dominant carrier that it would still be subjected to the substantive cause test. This meant that any material change in the terms and conditions would be grandfathered.

The FCC 2003 Decision clearly held and AT&T conceded that the plans at issue in this case were ordered prior to June 17th 1994. Therefore, AT&T's sole defense of fraudulent use presented to NJFDC Judge Politan, the Third Circuit Court and FCC in **1996** had absolutely no merit primarily because AT&T had already agreed under FCC Order in **1995** that the pre June 17th 1994 plans were penalty immune.

Attached as Exhibit A is the relevant section of the FCC October, 1995 Order in which AT&T relented to adhere to its tariff. Thus CCI's pre June 17th 1994 ordered plans were immune from shortfall and termination penalties on those commitments as they could be discontinued without penalty. This was also known as, and referred to as restructuring.

The FCC October, 1995 Order mandated that AT&T continue grandfathering the penalty immune pre June 17th 1994 plans –even under exceptional cases---so the plans would continue to be immune from shortfall and termination penalties. Obviously if AT&T was agreeing to adhere to its June 17th 1994 tariff provision which provides penalty immunity on discontinuance, AT&T cannot possibly suspect being deprived of shortfall and rely upon section 2.2.4 fraudulent use to deny the traffic transfer. AT&T's sole defense of fraudulent use was in effect meritless.

Judge Politan's second Decision was in March of 1996 that ordered the traffic transferred from the former customer CCI to the new Customer PSE. AT&T appealed that decision and maintained its sole defense of "fraudulent use" claiming it suspected it would be deprived of the collection of CCI's plans shortfall charges, despite already being under FCC Order as of October 1995. Obviously Judge Politan never saw this October, 1995 FCC Order, nor did the Third Circuit in **1996**.

The Third Circuit in April 1996 referral to the FCC was based upon AT&T's primary jurisdiction argument. However, the FCC had already ruled on this issue in October **1995**.

AT&T's briefs to the FCC in 1996 misled the FCC that AT&T was entitled to inflict shortfall penalties on plaintiff's pre June 17th 1994 penalty immune plans but AT&T had already agreed to continue grandfathering the pre June 17th 1994 CCI plans. Had AT&T simply adhered to the pre June 17, 1995 Tariff provision on discontinuance without liability, there would be no way that AT&T could have been able to reply upon Section 2.2.4 "Fraudulent Use." AT&T could not possibly **suspect** CCI was going to deprive AT&T from collecting shortfall charges when CCI's plans were immune from shortfall charges. Based on this knowledge, AT&T settled with CCI paying CCI cash plus waiving the $80 million in shortfall and termination charges when settling with the Inga Companies Co-plaintiff CCI. AT&T was obviously well aware that there should never have been any charges inflicted upon plaintiff's grandfathered plans. In essence, AT&T forgave $80 million dollars of what Judge Politan referred to as "illusory charges."

Moreover, AT&T's sole defense of fraudulent use lacks merit and has already been denied because:

1) Illegal Remedy—Even if AT&T had merit to reasonably suspect being deprived of collecting shortfall charges the FCC in 2003 has already decided that AT&T used an illegal remedy in implementing its 2.2.4 fraudulent use provision and therefore denied AT&T's use of 2.2.4 in any event. The FCC by law must find the same outcome based on the same set of facts when the DC Circuit passed on commenting on fraudulent use. Law of the Case.
2) Fifteen (15) Day Statute of Limitations within section 2.1.8 bars all defenses. AT&T did not deny the transfer within 15 days. AT&T in 1995 advised Judge Politan that the 15 days clause was not a statute of limitations date; however after the second March 1996 Judge Politan Decision AT&T clarified its tariff and conceded the Jan 1995 version of section 2.1.8 did need to meet the 15 day Statute of Limitations. Thus the traffic transfer issue is decided on this issue alone.
3) TR 8179 was an attempt by AT&T to retroactively change 2.1.8 so that when substantial traffic was transferred without the plan transferring, AT&T could automatically force the plan to transfer, so as to force the plan commitments to transfer. AT&T's Counsel Richard Meade Certification to Judge Politan states that the FCC in 1995 was concerned with AT&T's ability to measure fraudulent intent i.e. which is (suspecting fraudulent use)

and the FCC has already denied TR 8179. Mr Meade certified to Judge Politan that TR8179 was replaced by Tr9229 and that led to the tariff provision in which the security deposits against shortfall on the former customer. It determined that the transferring former customer under the tariff must keep the plan commitments. Meade certified to Judge Politan TR 9229 was a prospective tariff filing and therefore it was not determinative of the CCI-PSE transfer. AT&T misled Judge Wigenton during oral argument that the security deposit had to do with the first transfer of the plans between Inga Companies and CCI, when of course TR 9229 dealt with traffic only transfers like the CCI-PSE transfer. This tariff page was conclusive tariff evidence that the plans' revenue commitment does not transfer on a traffic only transfer but AT&T Counsel Guerra was able to deflect Judge Wigenton's question.

4) AT&T's Joyce Suek in 1995 stated AT&T banned all traffic only transfers using 2.1.8. AT&T conceded to the DC Circuit that 2.1.8 dis allow traffic only transfers and not just entire plan transfers. To slow down the migration of accounts to deeper discount plans like PSE's AT&T forced aggregators to delete the accounts and sign the accounts up again. Therefore, even if the plans weren't pre June 17, 1994 penalty immune, plaintiffs could not conform to AT&T's fraudulent use demand by reducing the amount of traffic it transferred under 2.1.8. Section 2.1.8 was unlawfully banned for use on traffic only transfers by AT&T legal department to prevent aggregators from obtaining additional discounts.
5) AT&T's post 2005 "all obligations" fraud defense ATTACKS its old fraud defense of relying up 2.2.4 "fraudulent use" tariff provision. AT&T is now claiming that CCI had to transfer all obligations! How could AT&T assert it suspected being deprived of collecting shortfall charges on CCI's revenue commitment when AT&T post DC Circuit claim is that no obligations even remain with CCI?
6) Under AT&T's "all obligations" misrepresentation CCI's plans had already transferred away all obligations from traffic transfers done **previous** to the January 1995 denied transfer. So under AT&T's "all obligations" fraud that means there were no obligations left on CCI's plans by the time of the Jan 1995 denied transfer. So why was AT&T claiming in 1995 that it suspected that it would be deprived of shortfall charges when according to AT&T today there were no revenue and time commitments even remaining on CCI's plans in 1995? AT&T's switched its position from CCI **must keep** and maintain its revenue and time commitments (fraudulent use defense) to CCI **must transfer away** its revenue and time commitments. These arguments were never supported by any evidence. Most importantly, these two arguments are logically incongruous. AT&T understanding it had no

evidence, simply created a new and bogus "all obligations" defense in 2006 because it lost its sole defense of fraudulent use.

7) The fiscal year revenue commitments on the CCI plans had already been met and the contract called for the traffic to be brought back to CCI plans within 30 days. Therefore, there was no contemplation of fraudulent use even if the plans weren't pre June 17th 1994 immune. So how can AT&T claim it suspected fraudulent use was going to happen when the contracts expressly demonstrate that the intent of the parties was to have the traffic taken back?

FCC Jan 12th 2007 Order

Judge Wigenton has never seen the FCC's January 12, 2007 Order. That Order provides that Judge Bassler's 2006 referral on which obligations transfer was not in controversy and did not expand the scope of the Third Circuit Referral concerning AT&T sole defense of fraudulent use. The FCC 2007 Order at FN 13 explicitly lists for the NJFDC the comments of AT&T and Inga Companies when both parties agreed that the revenue and time commitment do not transfer on the CCI-PSE transfer.

The FCC staff stated that even if Judge Bassler's referral was within the scope of the case it is still a moot issue. As you are aware AT&T has never mandated that on a "traffic only" transfer that plan obligations must transfer. That is why AT&T has never been able to provide the Court with any evidence---because NONE EXISTS, as it was an intentional fraud on Judges Bassler and Wigenton. Moreover, even if the FCC were to decide that plan obligations transfer under 2.1.8, that would be a change in the terms and conditions of section 2.1.8 and thus under the 1934 Communications Act, it would be a 15 days' prospective change. Therefore, plaintiff's CCI-PSE transfer would be grandfathered and not governed by a future FCC change—this is yet another reason Judge Bassler's referral is moot.

PSE Assumes the "Former Customers" Commitments Not the Transferors

The FCC's 2007 Order determined Judge Bassler's 2.1.8 Referral on which obligations transfer did not expand the scope of the original 2.2.4 AT&T fraudulent use defense. Even without that FCC 2007 Order NJFDC Judges Bassler and Wigenton have not seen the detailed tariff analysis that would have clarified the confusion and made sense as to why AT&T could never present any evidence to substantiate its position that "all obligations transfer. AT&T knows that no evidence exists to support what it asserted to Judges Bassler and

Wigenton. PSE was only responsible for assuming "all obligations of the **former** customer." CCI was **not** a former AT&T customer when it only transferred traffic and not its AT&T plan. In an attempt to confuse the issue before Judge Bassler, AT&T changed the words in its briefs of the actual tariff language to "the transferor" and asked Judge Bassler to focus on only two words, i.e. "all obligations." The rest of the sentence was ignored but when all obligations is not read in the proper context, it leads to confusion. A detailed tariff analysis is found on the FCC website: http://apps.fcc.gov/ecfs/comment/view?id=60001310889

Discrimination & Unreasonable Practices

The FCC 2003 Decision states at FN 87 that discrimination and unreasonable practices must be handled by the NJFDC. The fact is AT&T has never mandated since 1967 when AT&T service started to today that the revenue and time commitment (plan obligations) must transfer on a traffic only transfer. Anyone can simply pick up the phone and call AT&T customer support and understand AT&T intentionally misled the NJFDC Judges. This also means that Judge Wigenton can simply decide that AT&T discriminated against plaintiffs. The evidence is overwhelming against AT&T:

1) Six former AT&T counsels asserted to Judge Politan, the FCC in 1995-1996 and the DC Circuit Court that plan obligations do not transfer.
2) AT&T's own executives claim plan obligations have never transferred.
3) Plaintiffs have provided within the FCC comments certifications from 6 AT&T aggregators and all of them certified that they have done traffic only transfers and never did the plan obligations transfer under section 2.1.8.
4) Judge Politan and the FCC both stated AT&T has never provided any evidence to support its position. Additionally, while AT&T told Judge Wigenton that AT&T had addressed why it had no evidence at the FCC, it never actually did address the issue. Nor was any evidence presented.
5) To this day, AT&T counsels simply cannot offer any evidence because none exits. AT&T changed its position and created a new defense in **2006** which has been used to justify and offer a reason why AT&T unilaterally denied the transfer in **1995**.

AT&T (after the 15 days' statute of limitations had expired) held up the CCI transfer based solely on 2.2.4 fraudulent use. There was never an argument that plaintiffs did not adhere to section 2.1.8. This is precisely why AT&T tried to retroactively change section 2.1.8 by filing with the FCC TR 8179. Since AT&T's sole Fraudulent Use defense has already been denied by the FCC, and a defense that AT&T can no longer assert as detailed above, Judge Wigenton can simply hold that AT&T discriminated and engaged in unreasonable practices

against plaintiffs. Plaintiffs strictly adhered to section 2.1.8 just like many other AT&T customers, but were nonetheless denied the requested transfer resulting in millions of dollars of damages incurred by Plaintiffs.

The DC Circuit Decision Was Not A Remand

During the Oral Argument with Judge Bassler AT&T erroneously maintained that the DC Circuit Court decision was a remand. The FCC Office of General Counsel Austin Schlick and John Ingle stated it was **not** a remand. The DC Circuit Legal Director Martha Tomich and DC Circuit Counsel Laura Chipley also stated that the DC Circuit Court decision was **not** a remand and if it was it would have followed up with the FCC. The FCC stated that it typically will respond to the DC Circuit within the first year if it was a remand. It is now eleven (11) years since the DC Circuit Court decision so obviously both the DC Circuit and the FCC understood that there were no open issues after the DC Circuit Decision. The DC Circuit Decision corrected the FCC that 2.1.8--- as used in plaintiff's CCI-PSE "traffic only" transfer---- was expressly permissible. The DC Circuit did not remand the FCC's decision to deny AT&T's sole defense of fraudulent use under 2.2.4 of AT&T's tariff. DC Circuit Legal Director Ms. Tomich on Dec 1st 2015 advised plaintiff's that if plaintiff's wanted written clarification that the 2005 DC Circuit was not a remand, plaintiffs could file a motion and that will be clarified in writing. However it's obvious by the DC Circuit Court's and FCC's inaction and their statements that the DC Circuit Decision was not a remand; so there were no open issues.

Plaintiff's 1997 Supplemental Complaint

The FCC Oct 23, 1995 Order obviously also speaks to plaintiffs January 3,1997 Supplemental Complaint plaintiffs filed after AT&T on June 10th 1996 inflicted the shortfall and termination penalties anyway—despite AT&T conceding under the FCC's Oct 1995 Order to adhere to the pre June 17th 1994 tariff discontinue without penalty provision.

Plaintiff's transaction falls into the general substantive grandfathering rules but AT&T agreed under the FCC 1995 Order that even in exceptional cases AT&T would extend the discontinuance w/o liability grandfathering at least another year. The date of the FCC Order is October 23,1995 and the exceptional cases clause would cover at least to October 23,1996. Since AT&T applied the penalties in June of 1996 AT&T was conclusively violating the FCC's 1995 Order by putting

plaintiffs out of business in June of 1996. There is no tariff interpretation here. It is a simple FCC order that is conclusive AT&T unlawfully put plaintiffs out of business in June 1996.

In any event, I cannot think of any reason to continue asking the FCC to issue an Order when Judge Bassler or Judge Wigenton never saw the Orders the FCC released on October 25, 1995 and January 12, 2007. To me, when the facts of this case are juxtaposed with those FCC orders, it becomes apparent that AT&T violated its tariff and engaged in many misrepresentations on Judges Bassler and Wigenton. Judge Bassler's referral regarding which obligations transfer was denied by the FCC's 2007 Order. Since liability is clearly established due to these FCC Orders not seen by the New Jersey Federal District Court, the FCC and the DC Circuit, plaintiffs believe that Judge Wigenton can now lift the stay and proceed to damages. Judge Wigenton will understand and conclude that the FCC Orders conclude liability. Of course none of AT&T's defenses should have been able to be considered due to 15 days statute of limitations—which is a fact issue that Judge Wigenton must decide. Please let me know if I am missing something or am incorrect in some way in my thinking.

Very truly yours,

Raymond A. Grimes, Esquire

Cc: Client
Cc: FCC Comments

EXHIBIT A

Before the
FEDERAL COMMUNICATIONS COMMISSION FCC 95-427
Washington, D.C. 20554

In the Matter of)
)
Motion of AT&T Corp. to be)
Reclassified as a Non-Dominant Carrier)

ORDER

Adopted: October 12, 1995 Released: October 23, 1995

By the Commission: Commissioners Barrett, Ness and Chong issuing separate statements.

134. Finally, we note that AT&T has voluntarily committed to implement certain measures that are designed to address criticisms of its business practices that resellers have raised in this proceeding and elsewhere. AT&T represents that the following reflects an agreement with the Telecommunications Resellers Association, and AT&T has committed to comply with this agreement:

As a general practice, AT&T **grandfathers** both existing customers and subscribed customers (i.e., customers who have submitted a signed order for service) when it introduces a change to a term plan (including Contract Tariffs, term plans under Tariffs 1, **2,** 9, and 11, Tariff 12 Options and Tariff 15 CPPs), and it **commits to continue that process**. In exceptional cases, however, grandfathering may not be appropriate either because: (1) a change is necessitated by typographical errors, a service inadvertently priced below costs, rate changes where no individual rates (post-discount) are increased, or other comparable circumstances, or (2) the change is necessary to bring clarity to a non rate term or condition, where it is necessary to treat all customers alike (such as a change to the provisions for how orders are processed, but not including changes to the body of Contract Tariffs, Tariff 12 Options or Tariff 15 CPPs). In such circumstances, **AT&T commits for a twelve-month period to offer its customers the following additional protections not required of non-dominant carriers**:

- where AT&T makes any change to an existing term plan, AT&T will afford the affected customers 5 days meaningful advance notice of the tariff filing to give the customer the opportunity to object; provided, however, that for **changes to discontinuance with or without liability**, deposits and advance payments, **or transfer or assignment of service,** AT&T will file on 14-days' notice. (AT&T would have the unaffected right to change underlying tariff rates -- such as a general change to SDN rates -- unless the term plan protected the customer from such changes.) Where the affected customer(s) agrees to the revision, AT&T will note that agreement in its transmittal letter and file the change on 1 day's notice. **Where the affected customer objects to the change,** AT&T will file the change with the Commission on 6 days' notice. With respect to the 14 or 6 days notice filings, **the substantial cause test will be applicable to the same extent as it is today.**

Found Online At:
http://www.fcc.gov/Bureaus/Common_Carrier/Orders/1995/fcc95427.txt